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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

MICHAEL BANAFSHEHA, Plaintiff and Appellant, v. PEDRAM D. NASSIR et al., Defendants and Respondents.	B212290 (Los Angeles County Super. Ct. No. EC043039)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura Matz, Judge. Affirmed.

Haggai Law Firm and Christa R. Haggai; Bral & Associates and Sean Bral for Plaintiff and Appellant.

Ecoff, Law & Salomons, Lawrence C. Ecoff and Gary K. Salomons for Defendants and Respondents.

In this appeal, plaintiff Michael Banafsheha (plaintiff) appeals from awards of costs made against him and in favor of defendants Avremil Wagshul (Wagshul), Devorah Illulian (Illulian), and Farshad Nassir aka David Hullaster (Hullaster, and collectively with Wagshul and Illulian, respondents). Plaintiff contends the cost memoranda filed by respondents were not timely, and further contends respondents were not entitled to all of the costs awarded to them. Our examination of the record convinces us that the awards of costs should be affirmed.

BACKGROUND OF THE CASE

1. *The Complaint and Cross-complaints*

This suit was filed in June 2006. Named as defendants in plaintiff's complaint were Wagshul, Illulian, the Hilton Los Angeles Universal City (Hilton Hotel), and Pedram D. Nassir aka Daniel P: Nassir Hilton, M.D (Dr. Hilton). The complaint alleges the following. Dr. Hilton examined plaintiff at a medical office and sold plaintiff professional samples of prescription medicine. Thereafter, plaintiff returned to the medical office complaining of side effects of the medication. Plaintiff attempted to return the professional samples to Dr. Hilton and asked for a refund, but Dr. Hilton refused to take back the samples, refused to refund money to plaintiff, and verbally assaulted and abused plaintiff, which resulted in a verbal altercation between plaintiff and Dr. Hilton and plaintiff left the premises. Plaintiff did not see Dr. Hilton for several months until June 21, 2005 at a function held at Hilton Hotel, where Dr. Hilton intentionally, willfully, and maliciously, without provocation, assaulted, battered, and imprisoned plaintiff causing serious and permanent injuries to Plaintiff's person.

Plaintiff alleged causes of action against Dr. Hilton for assault, battery, false imprisonment and intentional infliction of emotional distress.

Additionally, plaintiff alleged a cause of action for premises liability against Hilton Hotel, Wagshul and Illulian. The complaint alleges that these three defendants "owned, maintained, controlled, managed, supervised and/or operated" the Hilton Hotel and did so negligently such that they failed to prevent foreseeable patrons and guests such as plaintiff from being exposed to perilous conditions, including but not limited to a lack of adequate security at the aforementioned function where there were several bars serving unlimited free alcohol to several hundred guests and uninvited and unscreened attendees, thereby causing and/or failing to prevent the assault on plaintiff. After plaintiff filed this suit he added Hullaster to the suit as a Doe defendant, alleging Hullaster also battered plaintiff at the Hilton Hotel.

In August 2006 Dr. Hilton cross-complained against plaintiff for assault, battery and damage to personal property. Regarding the incident involving plaintiff's seeking a refund for medication, Dr. Hilton alleged it occurred at the medical office of a Dr. Amanollah Refooah. Dr. Hilton alleged he was an employee of Dr. Refooah at that time and Dr. Refooah was treating plaintiff for mental illness. Dr. Hilton further alleged he never prescribed medication for plaintiff but Dr. Refooah did prescribe mood stabilizers and anti-anxiety drugs for plaintiff, and plaintiff has been hospitalized more than once for aggressive and psychotic behavior, and is prone to rage. Dr. Hilton alleged that on the day of the incident at the medical office, Dr. Refooah was not there when plaintiff came to the office and demanded a refund, and when Dr. Hilton advised

plaintiff he could not give him a refund and plaintiff would have to return to discuss the issue with Dr. Refooah, plaintiff became aggressive, threw things at Dr. Hilton, pushed over Dr. Hilton's desk, damaged medical and office equipment and a wall, battered Dr. Hilton, and told Dr. Hilton that he would ruin the doctor and the doctor would never work at the medical office again. Dr. Hilton called the Los Angeles Police Department and filed a report. Dr. Hilton alleged that although it had been his goal to take over Dr. Refooah's medical practice over the course of time because Refooah was nearing retirement, because of plaintiff's actions, Dr. Hilton has not worked for Refooah since the incident and is no longer in a position to take over his practice. He alleged that because of the incident he was denied use of the office space he had been using at Dr. Refooah's medical office, lost the value of the medical practice he was acquiring there, and suffered the damage to his office and medical equipment. He alleged causes of action against plaintiff for assault, battery, and damage to real and personal property.[1] [2]

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[1] Plaintiff asserts in his appellate brief that a cross-complaint was filed by Hilton Hotel alleging causes of action for apportionment, indemnity and declaratory relief, and a person named Hertzel Illulian is a cross-defendant in such cross-complaint. However, none of that is reflected in the record.

[2] The law firm Ecoff, Law & Salomons, LLP, represented six parties in this case—Dr. Hilton and Hullaster on the four intentional tort causes of action in plaintiff's complaint; Wagshul and Illulian on the cause of action in the complaint for premises liability; Dr. Hilton on his cross-complaint against plaintiff; and Hertzel Illulian on the cross-complaint which plaintiff states was filed by Hilton Hotel.

2. *Disposition of Causes of Action*

On May 9, 2008, pursuant to a statutory offer to compromise served by plaintiff and accepted by Dr. Hilton, judgment was entered in favor of plaintiff and against Dr. Hilton on the complaint in the amount of $49,999, and in favor of plaintiff on Dr. Hilton's cross-complaint, with Dr. Hilton taking nothing on his cross-complaint.

Respondents Wagshul and Illulian brought a motion for summary judgment on plaintiff's fifth cause of action for premises liability which was the only cause of action against them. The motion was granted and on April 25, 2008, a proposed summary judgment was submitted by Wagshul and Illulian to the court by facsimile. It was signed by the court on April 29, 2008 and filed that same day. The judgment that is in the clerk's transcript (the facsimile) does not have attached to it a proof of service showing that the proposed judgment was served on plaintiff's attorneys, nor a proof of service showing that the signed judgment was served on plaintiff's attorneys.

Then, on May 14, 2008, another proposed summary judgment in favor of Wagshul and Illulian was submitted to the court. It was signed and filed by the court on May 15, 2008. The record shows it was served on the parties (as the proposed judgment) on May 6, 2008. The record also shows notice of entry of the May 15, 2008 judgment was served on June 13, 2008 and filed on June 16, 2008.[3]

In the meantime, on June 10, 2008 a judgment on a special jury verdict was signed by the court and filed. That judgment is in favor of the third respondent in this

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[3] Respondents state in their appellate brief that the second proposed judgment was submitted to the court because "[f]or reasons unknown, . . . the Judgment could not be located; therefore a second Judgment was submitted on May 6, 2008."

appeal, Hullaster. Notice of entry of judgment was mailed by the clerk to the parties on that same day.

3. *Costs of Suit Claims*

On June 23, 2008, respondent Hullaster served and filed his cost memorandum claiming costs in the sum of $59,774.55. On that same day, respondents Wagshul and Illulian served and filed their cost memorandum of $4,732.35.

On July 14, 2008, plaintiff served and filed a motion to strike or alternatively tax respondents' memoranda of costs. Hearing on the motion was set for August 8, 2008. As a ground for his motion, plaintiff asserted the court's website did not show that the cost memos had been filed with the court in a timely manner. California Rules of Court, rule 3.1700 provides that the memorandum of costs must be served and filed within 15 days after the clerk or a party serves notice of entry of judgment, or 180 days after entry of judgment, whichever occurs first.

Plaintiff also asserted that the cost memos are defective in that respondents did not utilize the Judicial Council form memorandum of costs worksheet or otherwise provide specific information and itemization regarding the costs claimed by respondents, and instead they only filed Judicial Council form cost memorandum summaries.

Additionally, plaintiff argued the cost memos did not apportion costs among the several litigants who were represented by the respondents' attorney even though only three of those litigants (respondents) prevailed in this case, and in doing so, only respondent Hullaster had to try his defense of four of plaintiff's five causes of action,

and the other two respondents prevailed in a summary judgment motion on the only cause of action asserted against them.

On July 28, 2008, Respondents filed, and served by regular mail, a joint opposition to plaintiff's motion to strike the cost memoranda or tax costs. The opposition included Judicial Council form memorandum of costs worksheets. Plaintiff responded by filing a reply in which he contended that respondents' opposition papers were not timely filed because they did not conform to Code of Civil Procedure section 1005, subdivision (c)'s directive that opposition and reply papers be served by "personal delivery, facsimile transmission, express mail, or other means consistent with Sections 1010, 1011, 1012, and 1013, and reasonably calculated to ensure delivery to the other party or parties not later than the close of the next business day after the time the opposing or reply papers, as applicable, are filed." Plaintiff asserted respondents' failure to observe this directive prejudiced his ability and denied him the right to timely file and serve proper reply papers. He also asserted respondents failed to provide copies of receipts, invoices, statements and bills relating to costs claimed by them and disputed by him, and that respondents are not entitled to costs which they did not incur and pay.

At the August 8, 2008 hearing on the motion to strike or tax costs the court observed that it was not at all satisfied with the information supplied by respondents to support certain costs claimed by them. The court indicated respondents could stand on the papers they had already submitted and receive considerably less than the costs they claimed or they could resubmit their opposition to the motion to strike or tax costs. Plaintiff objected, saying he should not be forced to respond to new papers when

respondents had the opportunity to make their case for costs. The court acknowledged that but indicated it had a duty to "try to do what is right. And they are entitled to costs, whatever is appropriate." The court set another hearing for September 19, 2008, and directed respondents to submit their supplemental papers by August 27. Plaintiff was directed to submit response papers on or before September 12, but that date was continued to September 26, and the hearing was continued to October 3, 2008. On October 16, 2008, the court issued a "judgment for costs" in favor of respondents Wagshul and Illulian in the amount of $3,940.71. (As noted above, they had sought $4,732.35.) On that same day, the court also issued a "judgment for costs" in favor of respondent Hullaster in the amount of $35,337.61. (He had sought costs of $59,774.55.) Thereafter, plaintiff filed this timely appeal.

CONTENTIONS ON APPEAL

Plaintiff contends respondents waived their right to recover costs by not filing timely memoranda of costs, including not timely filing both memoranda of cost summaries and memoranda of cost worksheets.

Additionally, plaintiff contends respondent Hullaster is not entitled to recover the cost of the first day of plaintiff's deposition because it was taken the day before Hullaster was named as a Doe defendant, and he further contends the court abused its discretion when it failed to allocate costs among the defendants.

DISCUSSION

1. *Standard of Review*

The parties agree that the standard of review in this case is abuse of discretion. (*Wagner Farms, Inc. v. Modesto Irrigation Dist*. (2006) 145 Cal.App.4th 765, 774, *Wagner Farms, Inc*.) However, we observe that questions of law are reviewed de novo.

2. *The Summary Cost Memos Were Timely Filed*

Notice of entry of the May 15, 2008 summary judgment in favor of Wagshul and Illulian and against plaintiff was served by them on June 13, 2008 and filed on June 16, 2008. Notice of entry of judgment on the special verdict in favor of Hullaster and against plaintiff was mailed by the clerk to the parties on June 10, 2008. As noted above, under California Rules of Court, rule 3.1700, the cost memos had to be filed within 15 days after the date on which *service of notice of entry of the judgments* was made. By filing their costs memos on June 23, 2008, respondents all came within that 15-day period. Therefore, the cost memos filed by respondents were timely.

3. *Plaintiff Has Not Demonstrated That the Initial Exclusion of the Cost Memo Worksheets Constitutes an Untimely Filing of the Cost Memoranda*

Code of Civil Procedure section 1033.5 states in part that certain expenses of litigation are allowable as costs. Section 1033.5 also states that allowable costs must be reasonably necessary to the conduct of the litigation and not merely convenient or beneficial, and allowable costs must be reasonable in amount.

When the items claimed as costs on a verified cost memorandum appear to be proper, that is prima facie evidence that the expenses and services claimed were

necessarily incurred and reasonable in amount, and there is no requirement that the person claiming the costs include documentation (bills, statements, etc.) to support them. Rather, at that point it is the burden of the party objecting to an item of costs to demonstrate that it is not properly claimed. Thus merely objecting to an item that appears to be proper by filing a motion to strike or tax costs will not shift the burden to the person filing the cost memo to prove that the item was necessary and reasonable. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 131; *Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1267; *Wagner Farms, Inc*., *supra*, 145 Cal.App.4th at pp. 773-774.) However, the mere filing of a motion to tax costs may be a proper objection to an item if the item does not appear to be proper on its face. (*Nelson*, at p. 131.) As for the issue whether a claimed cost allowed by Code of Civil Procedure section 1033.5 was reasonably necessary in the litigation and reasonable in amount, that is a question of fact for the trial court's discretion. (*Wagner Farms, Inc*., *supra*, 145 Cal.App.4th at p. 774.)

Plaintiff contends respondents waived the right to claim costs by not filing Judicial Council form cost worksheets with their Judicial Council memoranda of costs summary. That is, plaintiff contends the worksheet forms are mandatory and had to be filed with the cost memorandum summary forms instead of with respondents' opposition to plaintiff's motion to strike or tax costs. Plaintiff cites no authority (statute, rule of court, or case law) for that contention. Neither the memorandum of costs summary nor the memorandum of costs worksheet indicates that the latter must be used in conjunction with the former; nor does the summary refer to the worksheet or

vice versa. Moreover, both forms, in their lower left corner, state: "Form Approved for Optional Use Judicial Council of California."

4. *Plaintiff Has Not Sufficiently Supported His Argument Regarding the Cost of Taking His Deposition*

Plaintiff's deposition was taken on January 29, 2007. Respondent Hullaster was substituted into the case as Doe One on the following day, January 30, 2007. On his cost worksheet, Hullaster claimed $1,539.20 for taking plaintiff's deposition on January 29, 2007 and $1,121 for videotaping it on that same day, for a total of $2,660.20. On appeal, plaintiff contends Hullaster cannot recover costs for plaintiff's deposition taken on January 29, 2007 because Hullaster was not a party to the litigation on that date. The problem with plaintiff's argument is that he has not shown that the trial court actually allowed this cost to Hullaster.

Hullaster claimed costs for taking depositions of 23 people over the course of 29 days. On his cost worksheet, Hullaster claimed a grand total of $23,389.81 for deposition costs, which included the $2,660.20 for the January 29, 2007 deposition of plaintiff. The record shows that the trial court allowed Hullaster $16,925.74 for deposition costs, and thus disallowed $6,464.07. There is no indication in the record which deposition costs were disallowed. Thus, there is no way to tell whether the court allowed the costs to which plaintiff now objects. Therefore, there is no need for this court to determine whether, if the costs were allowed, there was an abuse of discretion. However, we do observe that Wagshul and Illulian could have claimed the cost of that

deposition on their cost memorandum, but did not, and so the cost could have been allowed, at least in part, in any event.

5. *Plaintiff Was Not Entitled to an Apportionment of Hullaster's Costs*

Code of Civil Procedure section 1032, subdivision (b) provides that except as provided by statute, a prevailing party in an action or proceeding "is entitled as a matter of right to recover costs." Subdivision (a) (4) of section 1032 defines prevailing party to include, among others, "a defendant as against those plaintiffs who do not recover any relief against that defendant." That description would include all of the respondents. As between plaintiff and respondents, respondents are the prevailing parties. Subdivision (a)(4) also provides that as between plaintiff and Dr. Hilton, on both the complaint and Dr. Hilton's cross-complaint against plaintiff, plaintiff is the prevailing party because plaintiff received a net monetary recovery on his complaint, and on Dr. Hilton's cross-complaint, plaintiff was a cross-defendant against whom Dr. Hilton recovered no relief.

Fennessy v. DeLeuw-Cather Corp. (1990) 218 Cal.App.3d 1192 concerned a situation where all six defendants moved for summary judgment and only one prevailed. It was undisputed that the attorney who was defending the case performed tasks (depositions, etc.) that benefitted all six defendants. The prevailing defendant filed a cost memorandum and the plaintiff unsuccessfully sought to have the trial court strike the cost memo or tax costs, asserting that the costs had been incurred by all six defendants but only one of them had prevailed on the motion and was entitled to costs. The *Fennessy* court reversed and remanded to give the prevailing defendant the

opportunity to prove which costs were actually incurred by him in defending the litigation. The court stated that the trial court should have required the defendant claiming costs to show that he personally incurred the expenses or that he was entitled to the claimed costs for some other reason, even if they were chargeable to all of the defendants.

The *Fennessy* court held that when a prevailing party incurs costs jointly with other parties who remain in the litigation *and seeks recovery of costs during the pendency of the litigation,* that party may recover only costs actually incurred by it or on its behalf in prosecuting or defending the case. The court reasoned that in such situations if the plaintiff or defendant that is successful in a summary judgment or other pretrial matter were allowed all of its claimed costs, then if other co-parties were ultimately successful in the suit, they might claim costs which the first successful party had already claimed and been paid and those subsequently successful co-parties would possibly have to sue the earlier successful party to divide the costs it received. In *Jonkey v. Carignan Construction Co*. (2006) 139 Cal.App.4th 20, 26, the court observed that another reason for allowing a party who prevails prior to the end of the case to only recover its own costs of suit when costs are claimed during the pendency of the case is that the party from whom such costs would be recovered could otherwise be forced to pay the costs of a party who ultimately does not prevail.

Fennessy did not involve a situation like the one in the instant case. Here, the defendants who prevailed against the plaintiff at various stages of the litigation sought to recover their costs from the plaintiff at the end of the case. Although Wagshul and

Illulian were successful in their summary judgment motion on plaintiff's fifth cause of action for premises liability (which was the only cause of action against them), they did not seek costs until the case was concluded. It was concluded when (1) plaintiff received judgment in his favor on his complaint against Dr. Hilton and Dr. Hilton's cross-complaint against him pursuant to a statutory offer to compromise, and (2) Hullaster prevailed at trial. Thus, there is no danger that plaintiff could be asked to pay costs for which one of the defendants had already been paid.

Plaintiff contends that because the same law firm represented several of the parties in the case, the trial court should have apportioned, among those several parties, "[a]ll of the costs incurred prior to April 21, 2008," the date on which the trial court granted the motion for summary judgment brought by Wagshul and Illulian. Plaintiff also contends that "[a]ll of the costs incurred between April 21, 2008 and May 9 [2008] should be divided among three parties," apparently meaning Wagshul, Illulian and Hullaster. To support his proposed division of costs plaintiff relies on *Texatron Financial Corp. v. National Union Fire Ins. Co*. (2004) 118 Cal.App.4th 1061, specifically pages 1075-1076 of that opinion. However, that case addressed the portion of Code of Civil Procedure section 1032, subdivision (a) (4)'s "prevailing party" provisions which states that (1) when a party recovers relief other than monetary relief, or (2) in situations other than those specified in subdivision (a)(4)'s definitions of who is a prevailing party, then the prevailing party will be as determined by the trial court and the trial court, in its discretion, may allow costs or not and if it allows costs, it may apportion costs between parties on the same side or adverse sides. The *Texatron* court

stated that "[c]ases applying this statute hold that where one of multiple, jointly represented defendants presenting a unified defense prevails in an action, the trial court has discretion to award or deny costs to that party. [Citations.]" (*Id.* at p. 1075.) Here, instead of just one of the defendants prevailing, three of the four defendants represented by the single law firm prevailed against plaintiff.

Moreover, a question arises whether the law firm that represented the defendants presented a unified defense on their behalf. The only answers to plaintiff's complaint that were prepared by that law firm and that are in the record are the answer and first amended answer of Hullaster; and, whereas Dr. Hilton and Hullaster were sued for intentional torts (assault, battery, intentional infliction of emotional distress and false imprisonment), Wagshul and Illulian were sued for negligently maintaining the hotel premises.

As for plaintiff's contention that not apportioning costs among all of the defendants allows Dr. Hilton (who did not prevail in the case) to have his costs paid by means of the judgments obtained by the prevailing defendants, we observe that it is a general contention. Plaintiff does not point to specific portions of the cost bills submitted by respondents and claim that such portions are costs incurred solely to benefit Dr. Hilton. A similar contention was made by the appellant plaintiff in *Barnhart v. Kron* (1891) 88 Cal. 447. There, the appellant asserted that the respondent, who was one of two defendants, should only have been allowed to recover costs incurred by him separately and not those incurred by both defendants or separately by the other defendant. The reviewing court held that sorting out what services did or did not benefit

the respondent was a matter for the trial court's discretion because the trial court knew the issues, the character of the prosecution and defense, and whether there was any value in some respect or manner to the respondent of the items he claimed as costs.

DISPOSITION

The judgments for costs from which plaintiff has appealed are affirmed. Costs on appeal to respondents.

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CROSKEY, J.

WE CONCUR:

KLEIN, P. J.

KITCHING, J.